APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12561

CLARENCE I. JUSTHEIM, ET AL., APPELLANTS

v.

DOUGLAS McKAY, Secretary of the Interior, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided January 5, 1956

Mr. Clair M. Senior, of the bar of the Supreme Court of Utah, *pro hac vice*, by special leave of Court, with whom *Mr. Melville Ehrlich* was on the brief, for appellants.

Mr. George S. Swarth, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of Court, with whom *Mr. Roger P. Marquis* was on the brief, for appellee Douglas McKay.

Mr. William W. Clary, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of Court, with whom *Messrs. Albert Noble McCartney* and *Hugh Fullerton* were on the brief, for appellees Signal Oil and Gas Company and Southwest Exploration Company.

Before PRETTYMAN, WILBUR K. MILLER, and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Between 1938 and 1947 our appellants, or persons through whom they claim, filed with the Secretary of the Interior separate applications under

the Mineral Lands Leasing Act of 1920[1] for oil and gas leases of submerged lands off the coast of California. These lands are located below the line of mean low tide and within the three-mile limit. In 1948 appellants' applications were denied, on the ground that the lands in question were not subject to disposition under the Mineral Lands Leasing Act. Appellants then brought this suit against the Secretary, seeking an adjudication that the Act applied to lands under the marginal seas. Additional parties were allowed to intervene as defendants. The District Court concluded that the Mineral Lands Leasing Act applied only to public lands and that public lands do not include lands beneath the marginal seas. Judgment was entered for the defendants. This appeal followed.

In support of its conclusion the District Court rendered a memorandum opinion.[2] We think its reasoning was sound and we need not repeat it here. Appellants, however, say the court failed to give effect to several decisions of the Supreme Court. We consider this contention briefly.

Appellants first cite *Hynes* v. *Grimes Packing Co.*[3] There the Secretary of the Interior had been authorized to designate as Indian reservations in Alaska "any • • • public lands which are actually occupied by Indians or Eskimos within said Territory".[4] The argument was made that this

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[1] 41 STAT. 437, as amended, 30 U.S.C.A. § 181 *et seq.*, Sec. 1 of which Act provided in pertinent part: "That deposits of • • • oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, • • • shall be subject to disposition in the form and manner provided by this Act • • •."

[2] Justheim v. McKay, 123 F. Supp. 560 (D.C. D.C. 1954).

[3] 337 U.S. 86, 93 L.Ed. 1231, 69 S.Ct. 968 (1949).

[4] 49 STAT. 1250 (1936), 48 U.S.C.A. § 358a.

authorization did not extend to certain fisheries beyond the line of mean low tide. The Supreme Court rejected the contention. It made clear, however, that the conclusion rested upon "the history and habits of Alaska natives and the course of administration of Indian affairs in that Territory."[5] The Court was not dealing generally with lands located beneath the marginal seas; it was dealing with particular lands and with the necessity of fitting the statute before it into an "existing system" of custom and administration. Its decision lends no support to appellants' proposition that all lands under the marginal seas are public lands subject generally to disposal under the Mineral Lands Leasing Act.

Appellants also rely upon *Alabama* v. *Texas* and *Rhode Island* v. *Louisiana*.[6] These were companion cases in which the Supreme Court denied leave to file complaints challenging the power of Congress to quitclaim to certain states the interest of the United States in lands under the marginal seas.[7] In a short *Per Curiam* opinion the Court spoke of the power of Congress to dispose of "public lands" and

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[5] Hynes v. Grimes Packing Co., *supra*, 337 U.S. at 110-111. In its opinion the Court specifically rejected a statutory interpretation arrived at "by extracting • • • a single phrase, such as 'public lands,' and getting the phrase's meaning from the dictionary or even from dissimilar statutes." It emphasized the necessity of reading the statute as a whole and in context. *Id.* at 116. We think this admonition equally applicable here. Appellants contend that the words of the Mineral Lands Leasing Act, "lands • • • owned by the United States," should be given their dictionary meaning. The District Court, however, considered the history of the subject, the statute as a whole and the difficulties in administration posed by appellants' interpretation. It properly concluded that the intent of the Congress was better revealed by the whole than by an isolated part.

[6] 347 U.S. 272, 98 L.Ed. 689, 74 S.Ct. 481 (1954).

[7] By the terms of the Submerged Lands Act of 1953, 67 STAT. 29, 43 U.S.C.A. § 1301 *et seq.*

lands within the "public domain". But the Court was dealing with the power of Congress to dispose of those lands by special enactment. It decided only that Congress exercised proprietary rights over lands beneath the marginal seas and that those rights could be relinquished. The term "public lands" was thus used generally to designate lands subject to disposal as property of the United States.[8] It by no means follows that lands so designated are also subject to disposal under general laws such as the Mineral Lands Leasing Act. In the case at bar the District Court recognized and relied upon the distinction. It held, after careful consideration, that Congress did not intend to apply the Mineral Lands Leasing Act to lands under the marginal seas where problems of survey and administration would be wholly different from those contemplated in the statute. We think this conclusion is consistent with the Supreme Court decisions cited by appellants. The judgment of the District Court will therefore be

Affirmed.

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[8] See Hynes v. Grimes Packing Co., *supra*, 337 U. S. at 114 n. 39.

Filed Jan. 5, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956.

No. 12,561

CLARENCE I. JUSTHEIM, ET AL., *Appellants*,

v.

DOUGLAS MCKAY, Secretary of the Interior, et al., *Appellees*.

Appeal from the United States District Court for the District of Columbia.

Before: PRETTYMAN, WILBUR K. MILLER and BASTIAN, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellees, except appellee Douglas McKay, Secretary of the Interior, recover from appellants their taxable costs on this appeal and have execution therefor.

Dated: January 5, 1956.

PER CIRCUIT JUDGE PRETTYMAN.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 813

CLARENCE I. JUSTHEIM, ET AL., PETITIONERS

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT DOUGLAS McKAY, SECRETARY OF THE INTERIOR, IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. "A", pp. 1a–4a) is reported at 229 F. 2d 29. The opinion of the district court (R. 40–54)[1] is reported at 123 F. Supp. 560.

JURISDICTION

The judgment of the court of appeals (Pet. App. "A", p. 5a) was entered on January 5, 1956. The petition for writ of certiorari was filed on March 30, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] Reference is to the record consisting of the joint appendix in the court below and the accompanying documents.

STATUTE INVOLVED

The Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U. S. C. 181, reads in pertinent part:

> An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.
>
> *Be it enacted* * * * That deposits of * * * oil * * * or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this Act * * *.

QUESTION PRESENTED

Whether the Mineral Leasing Act of 1920, as amended, was applicable to submerged lands of the marginal sea prior to their transfer to the States by the Submerged Lands Act.

STATEMENT

At various times from April 1, 1938, through August 11, 1947, petitioners or their predecessors in interest severally applied to the Secretary of the Interior, under the Mineral Leasing Act of 1920, for oil and gas leases [2] of submerged lands off the coast of California (R. 4, 10, 30, 54–55). The applications were rejected by the Interior

[2] Some of the applications were for prospecting permits (R. 4, 30), but are now to be treated as applications for leases. 49 Stat. 675–676.

Department in August 1948, action having been withheld pending the decision in *United States* v. *California*, 332 U. S. 19. The basis of decision as to that part of the land which underlay the marginal sea was that it was not within the scope of the Mineral Leasing Act (R. 6–7, 11, 19, 55). Petitioners then brought this suit against the Secretary of the Interior for a declaratory judgment that the Mineral Leasing Act did apply to the area in question and to require him to entertain their applications on their merits (R. 1, 8–9, 55). The Signal Oil and Gas Company and the Southwest Exploration Company, lessees from the State of California of part of the area involved, were allowed to intervene as defendants (R. 39–40).

By the Submerged Lands Act of May 22, 1953, the United States granted to coastal States and their lessees the submerged lands of the marginal sea within their boundaries (67 Stat. 29, 43 U. S. C. (1952 ed.) Supp. II, 1301–1315), and by the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462, 43 U. S. C. (1952 ed.) Supp. II, 1331–1343) Congress made exclusive provision for mineral leasing of the remaining offshore area; but both acts preserved rights, if any, previously acquired under any laws of the United States.

Judgment denying relief was entered by the district court on October 29, 1954 (R. 57), and was affirmed by the court of appeals on January 5, 1956 (Pet. App. "A," p. 5a; 229 F. 2d 29).

ARGUMENT

1. Petitioners' basic contention is that the language of the Mineral Leasing Act, making it applicable to "deposits of * * * oil * * * or gas, and lands containing such deposits owned by the United States," is broad enough to include the submerged lands and minerals of the marginal sea, and must be given effect accordingly (Pet. 7, 13, 16). However, the rule has long been settled that land laws that refer in general terms to "land" do not include land under navigable water. Navigable water areas are held not for disposal but for the public and subject to the public right of navigation. They are commonly considered water rather than land, and must be specifically designated in a land law before they will be held to be within its scope. *Illinois Central Railroad* v. *Chicago*, 176 U. S. 646, 660; *Morris* v. *United States*, 174 U. S. 196, 234–235.[3] This is true of laws relating to mineral rights alone,

[3] State decisions are to the same effect. *Illinois Central R. R. Co.* v. *City of Chicago*, 173 Ill. 471, 483 (1898), affirmed, 176 U. S. 646; *Matter of City of New York (Schurz Ave.)*, 278 App. Div. 309, 310 (N. Y., 1951); *Tatum* v. *Sawyer*, 9 N. C. 226, 229 (1822); *Resort Development Co.* v. *Parmele*, 235 N. C. 689, 697 (1952); *State* v. *Pacific Guano Co.*, 22 S. C. 50, 84 (1884); *Goodwin* v. *Thompson*, 83 Tenn. 209, 215 (1885); *Cunningham* v. *Prevow*, 28 Tenn. App. 643, 651 (1945); *State of Texas* v. *Bradford*, 121 Tex. 515, 530, 543 (1932); *James River & K. P'r Co.* v. *Old Dominion Corp.*, 138 Va. 461, 471–472 (1924); *Baer* v. *Moran Brothers Co.*, 2 Wash. 608, 612–613 (1891).

as well as to laws for the disposal of fee titles. *Landry* v. *Robison,* 110 Tex. 295, 298 (1920). Since the Mineral Leasing Act does not mention land under navigable water, it must be presumed to be inapplicable thereto.

Substantive provisions of the Act reinforce this view. Section 13[4] contained detailed requirements for erecting "a monument not less than four feet high, at some conspicuous place" on the land, posting a notice on or near the monument, describing the land "by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land," and marking the corners "so that the boundaries can be readily traced on the ground." 41 Stat. 441; 49 Stat. 674. Clearly, Congress did not expect this act to be applied to the bed of the sea.

2. The Mineral Leasing Act should be construed to apply only to the public lands or public domain, terms which do not include land under navigable water. The use of the phrase, "lands owned by the United States," was not an innovation in the Mineral Leasing Act. Similar language had been used in the federal mining law ever since the Act of May 10, 1872, 17 Stat. 91, R. S. § 2319, where it was held to apply only

[4] This section, formerly codified as 30 U. S. C. 221, is now omitted from the Code as having expired by its own terms. Its provisions were indicative of the intention of Congress when the Act was passed.

to the public lands. *Oklahoma* v. *Texas,* 258 U. S. 574, 599–600. The same language, carried forward on the same subject into the Mineral Leasing Act, should be given the same construction. This view is supported by the facts that the act was entitled, "An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain" (41 Stat. 437), and that when it was before Congress it was repeatedly referred to in the debates and committee report as dealing with the public lands or public domain. *E. g.,* H. Rept. No. 398, 66th Cong., 1st sess., 11–13, 18.[5]

The submerged lands of the marginal sea are not "public lands" or "public domain." Those are synonymous terms that refer only to lands held subject to sale or other disposal under general laws. *Barker* v. *Harvey,* 181 U. S. 481, 490. They do not include land under navigable water, which is held primarily not for disposal but for the public and subject to the public right of navigation. *State ex rel. Town of Crescent City* v. *Holland,* 151 Fla. 806, 838 (1942); *Northern Pacific Ry. Co.* v. *Hirzel,* 29 Idaho 438, 456 (1916);

[5] Attorneys General Stone and Jackson both ruled that the Mineral Leasing Act applied only to public lands. 34 Op. A. G. 171; 40 Op. A. G. 9. Attorney General Clark ruled that it did not apply to the submerged lands of the marginal sea. 40 Op. A. G. 540.

City of Galveston v. *Mann*, 135 Tex. 319, 330 (1940).*

3. Petitioners argue (Pet. 7–12) that this Court has held in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, and in *Alabama* v. *Texas*, 347 U. S. 272, that the bed of the marginal sea is "public land." That contention is not sound. The *Hymes* case involved a withdrawal of land, including an area in the marginal sea, as an Alaskan Indian reservation, under the Pickett Act of 1910, 36 Stat. 847, and the Act of May 1, 1936, 49 Stat. 1250. Those acts both authorized withdrawals of "public lands," but whereas the Pickett Act was available anywhere and for any public purpose, the 1936 Act applied only to Alaskan Indian reservations. This Court said that the validity of the withdrawal of the offshore area "depends in this case on the scope of the power granted to the Secretary to establish this reservation by the language of § 2 of the Act of May 1, 1936" (337 U. S. at 101). Considering the particular purpose of the 1936 act, the well-known dependence of the Alaskan Indians on fishing, the previous history of Alas-

* Decisions of this Court are to the same effect. However, they have also rested upon another ground of decision not present in the case of the marginal sea, namely, that land under other navigable water within the Territories of the United States is held by the Federal Government in trust for the future States. *E. g.*, *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 283–284; *Shively* v. *Bowlby*, 152 U. S. 1, 49–50, 58.

kan Indian reservations, and the fact that the act authorized only a withdrawal and not a disposal of land, the Court concluded that Congress intended by the 1936 Act to authorize withdrawals of offshore areas. In thus relying on those special circumstances, and in holding that the validity of the offshore reservation depended wholly on the effect of the 1936 Act, the Court clearly indicated that the marginal sea bed was not "public land" in the ordinary sense of the term or within the scope of the Pickett Act.

Alabama v. *Texas*, 347 U. S. 272, sustaining the constitutionality of the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. (1952 ed.) Supp. II, 1301–1315, quoted earlier decisions declaring the plenary power of Congress to dispose of property of the United States. Some of those quotations referred to public lands; but it is apparent that the Court's purpose was only to indicate the broad sweep of the Congressional power, not to categorize the submerged lands of the marginal sea.

4. There has been no conflict between courts on the question, and none seems likely to arise. The question has no continuing importance. The submerged lands within State boundaries were granted to the coastal States by the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U. S. C. (1952 ed.) Supp. II, 1301–1315; those beyond State boundaries can now be leased only under the Outer Continental Shelf Lands Act of

August 7, 1953, 67 Stat. 462, 43 U. S. C. (1952 ed.) Supp. II, 1331–1343. Both acts preserve rights, if any, previously acquired under federal laws; but no new offshore claims can be asserted under the Mineral Leasing Act beyond those already filed.

CONCLUSION

The decision of the court below is clearly correct. Further review is not warranted, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
GEORGE S. SWARTH,
Attorney.

APRIL 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956